

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of LINDA ROSE SHAWLEY,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JOHN DARRELL SHAWLEY,

Respondent-Appellant.

UNPUBLISHED
March 10, 2005

No. 256408
Oakland Circuit Court
Family Division
LC No. 03-684000-NA

In the Matter of JOHNATHON CHASE
SHAWLEY, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JOHN DARRELL SHAWLEY,

Respondent-Appellant.

No. 256409
Oakland Circuit Court
Family Division
LC No. 03-684001-NA

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

In these consolidated appeals, respondent appeals as of right from the trial court's orders terminating his parental rights to the minor children, Linda Rose Shawley and Johnathon Chase Shawley, under MCL 712A.19b(3)(b)(ii), (g), and (j). We affirm.

I. Facts and Procedure

On September 2, 2003, Anne Marie Shawley, the two-year-old sibling of the two minor children, died from injuries inflicted upon her by Johnathon's mother, Nikole Frederick.¹ In separate but substantially similar petitions, petitioner sought termination of respondent's parental rights to both of the surviving children. The petition concerning Johnathon also sought termination of Frederick's parental rights.² Both petitions alleged that Anne Marie was brought to the emergency room with burns and multiple bruises on her body. The petitions alleged that Linda described Frederick putting tape over Anne Marie's mouth, yelling, and spanking Anne Marie while Anne Marie was lying on a hot heat vent and vomiting. Linda indicated that respondent was "lying down" while Frederick spanked Anne Marie. Later amended petitions revealed that Frederick was convicted of first-degree murder for the killing of Anne Marie and was sentenced to life imprisonment without parole.

Following her murder conviction, Frederick pleaded no contest to the allegations in the petition seeking to terminate her parental rights to Johnathon. The court accepted the plea, took jurisdiction over Johnathon, and terminated Frederick's rights to Johnathon.

An adjudicative hearing concerning jurisdiction over Linda commenced on April 22, 2004. But before trial, respondent argued that he was also entitled to adjudicative hearing concerning jurisdiction over Johnathon. The trial court, noting that it had already exercised jurisdiction over Johnathon by virtue of Frederick's plea, and relying on the case of *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), ruled that it could not take jurisdiction twice, and that the trial would be limited to determining whether there was a statutory basis for the court to exercise jurisdiction over Linda. Following the trial, the jury found that the court had jurisdiction over Linda.

Based upon the evidence introduced at the jury trial, the court found clear and convincing evidence of the following: that respondent had the opportunity but failed to protect Anne Marie from injury, and that there was a reasonable likelihood that the children would suffer injury or abuse if placed in his home, MCL 712A.19b(3)(b)(ii); that respondent failed to provide proper care and custody for the children and there was no reasonable likelihood that he would be able to do so in the reasonable future considering their ages, MCL 712A.19b(3)(g); and that there was a reasonable likelihood the children would be harmed if returned to respondent's home, MCL 712A.19b(3)(j). The court found by clear and convincing evidence that at least one statutory ground existed to terminate respondent's parental rights to both Linda and Johnathon.

At the subsequent dispositional hearing, respondent declined to present any evidence showing that termination was clearly contrary to the best interests of the children. The only evidence presented by the petitioner was respondent's psychological evaluation. The court terminated respondent's parental rights to both of the children, finding that termination was not clearly contrary to the best interests of the children.

¹ Frederick is not the mother of Linda or Anne Marie.

² Petitioner did not seek termination of the parental rights of Linda's mother.

II. Analysis

A. Respondent's Right to an Adjudicative Trial Regarding Johnathon

Respondent argues that the family court erred in terminating his parental rights to Johnathon without first holding an adjudicative hearing specifically related to his parental rights to Johnathon. Respondent also claims that the family court's error violated his due process rights.³ This issue concerns family court procedure under the court rules and applicable statutes, which is a question of law subject to de novo review. *In re CAW*, 469 Mich 192, 197; 665 NW2d 475 (2003); *In re CR*, *supra* at 200. The due process aspect of respondent's claim is also a legal question that this Court reviews de novo. *In re CR*, *supra* at 203.

Respondent argues that each parent is entitled to an adjudicative hearing regarding each child to determine jurisdiction over that child. Respondent contends that even though the family court took jurisdiction over Johnathon in regard to Frederick, he was entitled to an adjudicative hearing regarding whether the family court also had jurisdiction over Johnathon in regard to him. Respondent reasons that the use of the singular form of "parent" in the jurisdictional statute, MCL 712A.2(b),⁴ and the singular form of "respondent" in MCR 3.977(B)⁵ suggests that the family court takes jurisdiction over a child separately in regard to each parent. However, the use of the singular form suggests, to the contrary, that jurisdiction over a child may be exercised based on findings concerning only one parent. The language of the court rule and statute in no way mandate a trial concerning every parent in order for the court to take jurisdiction over a child.

In *In re CR*, *supra* at 205, this Court explained:

³ " 'There is no question that parents have a due process liberty interest in caring for their children and that child protective proceedings affect that liberty interest.' " *In re CR*, *supra* at 204, quoting *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001).

⁴ MCL 712A.2(b) provides that the court has

[j]urisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .

⁵ When used in proceedings in which termination of parental rights is sought, " 'respondent' includes (1) the natural or adoptive mother of the child; (2) the father or the child as defined by MCR 3.903(A)(7)." MCR 3.977(B).

[T]he court rules simply do not place a burden on a petitioner like the FIA to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity. The family court's jurisdiction is tied to the children, making it possible, under the proper circumstances, to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding.

Thus, after Frederick pleaded no contest to the allegations set forth in the FIA petition, the family court had the authority to take jurisdiction over Johnathon and proceed to terminate respondent's parental rights without holding an adjudicative hearing regarding Johnathon. See *id.* at 202-203.

This Court cautioned only that the petitioner "must provide legally admissible evidence in order to terminate the rights of the parent who was not subject to the adjudication."⁶ *In re CR*, *supra* at 205-206. Petitioner provided such legally admissible evidence at the adjudicative trial regarding Linda. Respondent was involved in the trial regarding Linda and was represented by counsel. The trial regarding Linda was based upon a petition containing allegations that were identical in all material aspects to those alleged in the petition filed in Johnathon's case. The family court relied on the legally admissible evidence admitted at this trial in deciding to terminate respondent's parental rights to Johnathon. Therefore, the family court did not violate respondent's due process rights by terminating his parental rights to Johnathon without first conducting an adjudicative hearing specifically relating to Johnathon.

B. Photographic Evidence

Respondent also argues that the trial court abused its discretion in admitting a photograph of Anne Marie before her injuries and a post mortem photograph of Anne Marie. A decision whether to admit photographic evidence is reviewed for an abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

Respondent contends that the photographs should have been excluded under MRE 403 because they had little or no probative value and were introduced merely to inflame the jury. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

The photographs of Anne Marie were offered to refute respondent's claim that he was asleep when the injuries were inflicted, that he did not notice the injuries, and that the injuries were accidental. We agree that the severity and multitude of injuries depicted tends to prove that the infliction of the injuries likely caused some noise over the course of the time they were

⁶ See MCR 3.977(F)(1)(b). Respondent does not challenge the constitutional validity of this court rule.

inflicted. This fact makes more likely a conclusion that respondent knew that Anne Marie was being beaten, an issue that is central to petitioner's theory that respondent failed to protect Anne Marie. Further, the photograph of Anne Marie's obviously battered body illustrates an illogical level of denial on the part of respondent, who continued to maintain that Frederick did not harm Anne Marie and that her death was an accident. Respondent's denial is also a fact that is clearly consequential to his ability to recognize dangers, protect his children, and provide a safe environment, all of which were centrally relevant to petitioner's case.

We further conclude that the danger of unfair prejudice does not substantially outweigh the probative value of the photographs. Although the post mortem photograph is disturbing, there is no indication that this photograph presented an enhanced or altered representation of Anne Marie's injuries. " '[I]f photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors.' " *Mills, supra* at 77, quoting *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972). Further, while various witnesses testified about Anne Marie's injuries, the appearance of the injuries is conveyed most directly and clearly by photographs. A picture need not be excluded merely because a witness can orally testify about the information contained therein. *Mills, supra* at 76. The trial court did not abuse its discretion by finding that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice.

C. Ineffective Assistance of Counsel

Finally, respondent contends that his trial counsel was ineffective for failing to object to the lack of foundation concerning the two photographs of Anne Marie. Whether respondent was denied the effective assistance of counsel presents a constitutional question subject to de novo review. *In re CR, supra* at 197. " '[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings.' " *Id.* at 197-198, quoting *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), overruled on other grounds by *In re Trejo Minors*, 462 Mich 341; 612 NW2d 407 (2000). To prevail on a claim of ineffective assistance of counsel, respondent must show that his trial counsel's performance was deficient, i.e., he must " 'show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced' " him that it denied him a fair trial. *In re CR, supra* at 198, quoting *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In order to prove prejudice, respondent must show that there is " 'a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.' " *In re CR, supra* at 198, quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Here, even if counsel erred by failing to object to the admission of the two photographs based upon lack of authentication, and the photographs should have been excluded on these grounds, respondent has failed to show that he was prejudiced by the admission of the photographs. The photograph of Anne Marie before her injuries is similar to one admitted by stipulation of the parties, and the post mortem photograph is no more gruesome than autopsy photographs that were admitted without objection by respondent's counsel. On appeal, respondent does not contest the admission of these autopsy photographs.

Thus, the jurors were subjected to various disturbing photographs, and the erroneous admission of one such photograph would not have affected the jury's decision.

Affirmed.

/s/ Brian K. Zahra

/s/ William B. Murphy

/s/ Mark J. Cavanagh